No. 11877.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Appellant,

vs.

ANTHONY DILEVA, IVAN JURJEV, MARIE DILEVA, MIKE DILEVA, SALVATORE DILEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,

Appellees.

OPENING BRIEF FOR APPELLANT.

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Appellees.

OPENING BRIEF FOR APPELLANT.

This appeal is from a final decree (entitled "Judgment") in admiralty of the District Court for the Southern District of California, Central Division, Hon. Peirson M. Hall, presiding, which adjudged appellant liable to appellee DiLeva for himself and for the other appellees in various amounts less unspecified amounts for taxes, entered December 9, 1947; the appeal is also from the order of the said District Court made and entered in the minutes of District Court on October 30, 1947, by which appellant was ordered to pay damages to appellee Salvatore DiLeva in the sum of $4,752, less operating expenses, unemployment taxes and withholding taxes.

The case was tried twice in the District Court. The first trial was by Hon. Ben Harrison on the second

amended libel. By memorandum opinion he indicated that the action had been brought against the wrong party. Appellees were allowed to amend and join another party. Trial on the fifth amended libel was *de novo* by Judge Hall. He dismissed the action as to the new party and entered the decree against appellant from which this appeal is taken.

Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the cause set forth in the libel is for maritime collision and wages, of which the District Court had jurisdiction by virtue of the constitutional grant of admiralty jurisdiction (Art. III, Sec. 2) and Sections 24 and 256 of the Judicial Code ((28 U. S. C. A., Sec. 41(3); 371)). The jurisdiction of this Court to review the said decree rests upon Section 128 of the Judicial Code ((28 U. S. C. A., Sec. 225, assignments of error [A. 51], petition for appeal [A. 48], order allowing appeal [A. 49])), notice of appeal [A. 51], citation on appeal [A. 2] all duly served and filed within the statutory period.

Statement of the Pleadings.

Appellant has included in the Apostles only the libels and the pleadings thereto upon which the two trials below were had. The original libel, the first, third and fourth amended libels, which appear in the clerk's transcript, are summarized below to acquaint the Court with the proceedings.

The original action was by appellees Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna,

Pasquale Guglielmo and Pietro Colombo against appellant. They alleged that they were the crew of the BESSEMER on a share agreement, that appellant owned the GLORIA R, that due to negligence of appellant's employees the GLORIA R collided with the BESSEMER and that they thereby lost eight fishing days for which they sought recovery. Appellant's exceptions were sustained, with leave to amend.

The first amended libel, by the same libelants against the same respondents, was substantially the same, to which was added the allegation that appellant was also the owner of the BESSEMER, and that Anthony DiLeva was operating the vessel as master by authority of appellant. Appellant's exceptions to the first amended libel were overruled with leave to answer.

Before appellant answered, however, appellees served and filed the second amended libel [A. 3] in which the same parties appeared. The only change was a substantial alteration of the description of the maneuvering of the BESSEMER at and previous to the time of collision. Appellant excepted to the libel [A. 8], and answered [A. 9], admitting ownership of the BESSEMER and the GLORIA R and that the fishermen of both boats were its employees; appellant alleged that appellees were operating under a fishermen's shares agreement by virtue of which appellees' wages were contingent upon profits being earned from operation of the BESSEMER to which appellant was entitled, but which if earned it was obligated to share with appellees. Appellant denied negligence of the GLORIA R and alleged that the collision was due to sole fault of the BESSEMER; admitted that the vessel was laid up eight fishing days and alleged that no profits were

made during that period and that appellant had no obligation to appellees therefor.

Appellee's exceptions were overruled and the case proceeded to trial before Judge Harrison. The District Judge upon submission of the case rendered a Memorandum Opinion [A. 14] in which he found the GLORIA R in sole fault; that a "charter party agreement" [A. 90] (which had been offered by appellees as the agreement under which they had been operating) showed that the fishermen were not employees of appellant; that the appellees could not recover under the existing status of the case but probably could effect a recovery by amending their libel and joining a new party, the so-called "charterer" of the GLORIA R. Appellees were given the opportunity to amend.

In the Third Amended Libel, appellee Salvatore DiLeva alone appeared as libelant with appellant, and Gennaro DiLeva and Anthony DiLeva as respondents. No order allowing such change of parties was obtained. It alleged that appellee Salvatore DiLeva was the charterer of the BESSEMER and the other appellees were crew members, for whom Salvatore DiLeva was suing; that appellant owned the GLORIA R, with Gennaro DiLeva as charterer and Anthony DiLeva as master, but that libelant was uncertain as to whether the appellant or Gennaro DiLeva was in fact the employer of the master and crew of the GLORIA R.

Appellant's exceptions to this libel were sustained. The action was dismissed as to Gennaro DiLeva and Anthony DiLeva by stipulation.

In the Fourth Amended Libel, appellee Salvatore DiLeva was libelant and appellant respondent. It alleged

that Salvatore DiLeva was charterer of the BESSEMER who employed and was suing on behalf of the other appellees as crew members of the BESSEMER; that they were operating under a "share agreement"; that appellant was the owner of the GLORIA R and employer of her master and crew. Appellant's exceptions to the Fourth Amended Libel were sustained.

In the Fifth Amended Libel [A. 16] appellee Salvatore DiLeva is libelant, suing on behalf of the balance of appellees. Appellant and Gennaro DiLeva are named as respondents but initially service was made only upon appellant. Appellant is described as the owner of both fishboats. Salvatore DiLeva was alleged to be in possession of the BESSEMER under an oral agreement for possession during the current sardine season; he placed his net aboard, he engaged a crew, nominated a master who was appointed by appellant, had control of the activities and conduct of the crew (the other appellees). The compensation of appellees was a share of the fish caught by the BESSEMER, all of which was required to be delivered to appellant. Appellees were carried on appellant's books as employees and proper tax deduction made by appellant. Appellant was alleged to have either employed Gennaro DiLeva to operate the vessel or to have given him a demise or a bareboat charter; it was further alleged that either appellant or Gennaro DiLeva employed a master and crew for the GLORIA R. Appellant excepted.

In the colloquy between counsel and the Court at the hearing of the exceptions on April 7, 1947 [A. 313-317], the Court indicated that the exceptions were overruled, that the Court was of the opinion that appellees were not employees of appellant. Counsel for appellees took

the position that these men were employees [A. 315]. When the Court told appellee's counsel that he would receive an adverse judgment if the "second DiLeva" were not brought in, counsel readily acquiesced. Process was issued against Gennaro DiLeva on April 9, 1947, and served. Appellant and Gennaro DiLeva excepted and answered. The answer [A. 28] alleged that appellee Salvatore DiLeva was a "fishboss," an employee of appellant, that the other appellees were also employees of appellant, working on a share agreement; that the master and crew of the GLORIA R were working under a similar share agreement identical to that in effect for the BESSEMER.

No ruling was made by the Court upon the exceptions of Gennaro DiLeva. At the hearing for setting for trial [A. 318] Judge Harrison disqualified himself and the case was transferred to Judge Hall for further proceedings.

Appellant moved for dismissal of this action [A. 37]. The motion was denied, the exceptions overruled, Judge Harrison's Memorandum Opinion was interpreted to be a vacation [A. 67] of the former trial and the case proceeded to trial. No evidence having been offered as to Gennaro DiLeva, his motion for dismissal at the close of appellee's case was granted. Judge Hall found that the collision between the fishboats was due to sole fault of the GLORIA R, and that appellees were entitled to recover damages from appellant in the sum of $4,752 based on loss of 10 fishing days less operating expenses, unemployment taxes and withholding taxes [A. 41].

The Formal Findings of Fact [A. 42], Conclusions of Law [A. 44], and Final Decree (labeled "Judgment")

[A. 46] awarded $239.22 to twelve appellees; $363.53 to appellee Anthony DiLeva and an additional $621.65 to Appellee Salvatore DiLeva for loss of use of his net, a total of $3,855.82. This decree, appellant believes to be erroneous, and has accordingly appealed.

Statement of Facts.

At the times material to this case, appellant owned two fishboats, the BESSEMER and the GLORIA R [A. 177]. These vessels collided on October 4, 1944 while they were fishing, in the Catalina channel. The BESSEMER sustained damage which resulted in the loss of eight fishing days while repairs were effected. This action is for damages by the crew of the BESSEMER for loss of earnings during the time the vessel was unable to fish.

Appellee Salvatore DiLeva, was the owner of the net used aboard the BESSEMER and generally in charge of the operation of the vessel. His son, appellee Anthony DiLeva, was master and the balance of the named appellees were the crew. The relationship among the crew, master, "fishboss," vessel and appellant was in accordance with the San Pedro custom for vessels in the sardine fisheries [A. 178, 298].

The GLORIA R was operated under the same arrangement by Gennaro DiLeva as "fishboss," with his son Anthony DiLeva as master. The two Anthonys are cousins. The pleadings have been amended to conform to the identical spelling of the surname [A. 72].

There is much uncertainty as to the precise status claimed for appellees. Throughout the many amended libels they changed their position with surprising facility, sometimes being designated as employees of appellant and as often, described as employees of a bareboat charterer.

Whatever status the Court found necessary for a recovery at any given time, they claimed. The fact is that on September 11, 1944, appellant and appellee Salvatore DiLeva, executed a written document designated as a "charter party" [Libelant's Exhibit 1 for identification; Libelant's Exhibit 3 in the first trial; A. 90-94]. By the agreement appellant agreed to let and charterer to hire the vessel BESSEMER for a period until October 1, 1942. Charterer agreed to deliver and sell all fish caught by said vessel to appellant and appellant agreed to pay the market price for any fish accepted. Charterer agreed to furnish and maintain a net and pay certain operating expenses. Appellant agreed to provide insurance. The net proceeds computed according to San Pedro custom were to be divided into 18¾ shares. Originally appellant was to receive three shares for charter hire of the boat, but later this was reduced to two and three-fourths shares by oral amendment [A. 106, 112]. At the time of the collision the share arrangement was as follows: Salvatore DiLeva, 3½ shares (one fisherman's share and the net's 2½ shares), appellant, 2¾ shares (for the boat); Anthony DiLeva, 1½ shares (as master); and each of the eleven remaining crew members, one fisherman's share.

Shortly after moonrise or at about 9:00 p. m. on the date of the collision, the vessels were searching for fish in the Catalina channel several miles off the east end of Catalina Island. In the crow's nest of the BESSEMER, appellee Anthony DiLeva, directed operations as "mastman." These vessels have dual controls, one set inside the pilot house and the other set on the topside or roof of the pilot house. The topside controls were being used. Appellee Salvatore DiLeva was at the wheel; appellee Mike DiLeva, the master's brother, was at the engine

controls and appellee Salvatore Carnevale was also in the pilot house, and Chigi Romolio was bow lookout. Two crew members were in the skiff with one end of the net [A. 213] ready to lower the net upon signal. The other end of the net was on the stern of the boat.

On the GLORIA R, Anthony DiLeva was in the crow's nest, Biago Cuomo was wheelman, Nicola Curci was on the pilot house, Jacob Pugliesi was bow lookout.

There is conflict between the witnesses as to the ensuing events, prior to the collision between the bow of the BESSEMER and the starboard side of the GLORIA R amidships [A. 141].

The Bessemer's Version.

The BESSEMER witnesses state that they had located a school of fish but were not sure of its exact location because the moon prevented them from seeing the usual phosphorescence [A. 79, 230]. They made two counter clockwise circles around the school. The reason for the preliminary circling of the school is to concentrate the fish [A. 144, 246]. The circle is usually made counter clockwise [A. 233], because the gear is on the left side of the boat [A. 143]. After the two counter clockwise circles, the BESSEMER started a clockwise circle, which is admittedly a "little irregular" [A. 233]. Meanwhile the GLORIA R made a large counter clockwise circle around the BESSEMER at a distance of about a mile and a half [A. 233] or two or three miles to the north [A. 81], and proceeded toward the island and south of the BESSEMER searching for fish. Not finding any, the GLORIA R headed for San Pedro. As the GLORIA R circled, her red light was visible to the BESSEMER. As the BESSEMER was completing its second counter clockwise

circle, the master of the BESSEMER states that the vessels were "red to red" [A. 82], that the BESSEMER's port light was showing to the GLORIA R and that he saw the GLORIA R's red light only. He then states [A. 83] that he saw the GLORIA R's red and green lights and thereafter the green light only which indicated a turn to port across the BESSEMER's bow. The BESSEMER had been going at one or one and a half knots during the circling [A. 80]. The master ordered full astern, when the GLORIA R was 40 to 50 feet off [A. 99], but the vessel continued forward at one-fourth or one-half mile per hour [A. 103] until the bow of the BESSEMER collided with the starboard side of the GLORIA R. It takes a half minute [A. 126] or a minute or two [A. 101] to release the clutch of the BESSEMER and put the engine full astern, and two or three minutes to come to a full stop [A. 125].

The Gloria R's Version.

The GLORIA R, searching for fish in the vicinity of Catalina Island passed to the north of the BESSEMER, headed toward the east end of the island, found no fish and headed toward San Pedro. The green light of the BESSEMER was visible about a mile ahead [A. 137]. The GLORIA R was navigated to pass under the stern of the BESSEMER [A. 142] and would have cleared it by about 50 feet [A. 143] or 100 feet [A. 247] but for an unexpected turn to starboard which the BESSEMER made after crossing the GLORIA R's course. The BESSEMER continued the starboard turn, doubling back on her course, until her bow collided with the starboard side of the GLORIA R, which at the time was making an *in extremis* turn to port. The BESSEMER seemed, at a distance, to be stationary or nearly so [A. 155].

There is a flat conflict as to whether according to "San Pedro custom" the red masthead light indicates that the fishboat is "on fish" or whether it shows that the net is actually in the water. The GLORIA R witnesses say that it is lighted when the school is being circled [A. 142, 154, 163, 165, 171]. The BESSEMER witnesses state that the custom is to put on the red light when the net is being lowered [A. 96, 117].

The BESSEMER's white masthead light was not lighted because it interfered with seeing the fish [A. 118]. The GLORIA R was likewise operating without a white masthead light.

The GLORIA R was operating at a speed of seven or eight miles per hour and the BESSEMER at about one and one-half or two miles per hour.

As a result of the collision the BESSEMER sustained damage to her bow. She was unable to fish until October 13th and lost eight fishing days, October 4, 5, 6, 8, 9, 10, 11 and 12.

Questions Involved.

Appellant believes these questions to be presented to this Court:

1. Do crew members on a fishboat working on a "shares" agreement have a cause of action for detention damage when two commonly owned fishboats collide?
2. What is the legal effect of a certain "charter party" provision eliminating claims for "loss of use"?
3. Was the GLORIA R in sole fault for the collision?
4. Were damages correctly awarded?

Summary of Argument.

There is normally on appeal in admiralty a presumption of the correctness of the District Court's decree. In this case, Judge Harrison decided that appellees had no cause of action against appellant when the first trial was completed. The opposite result, reached by Judge Hall in the second trial, cannot be favored over Judge Harrison's conclusion.

Appellees were operating on a "shares agreement" in effect on all fishing boats in the sardine fisheries. There may be some doubt as to the exact legal relationship arising under a certain "charter party" agreement but appellant regards the fisherman as its employees rather than employees of an independent contractor. They are entitled to sue the shipowner as employees in the event of personal injury, the owner of the boat is obligated to pay employer's taxes and many of the *indicia* of employment are present.

The owner of the vessel is the sole owner of the right to sue for the proceeds of a fishing voyage on shares. The master and crew do not have any right to sue or title to the proceeds, but have only a right to share in the proceeds if, as and when they are realized by the owner. If there are no proceeds, either as the money equivalent of the catch, or in the form of a cause of action against a wrongdoer, there is nothing upon which the profit sharing agreement can operate. One nineteenth of nothing is nothing. The crew's rights, in the event of loss of use, are no better than the owner's rights, because the crew claims only through the owner. If the owner has no cause of action, because he cannot sue himself, the crew can stand in no better position.

An entirely new field of employer's liability is opened by the District Court's decree. That employees in one department on wages, either fixed or contingent, should be able to sue for lost wages due to casualty in another department would be a novel, and unwarranted extension of employer's liability law. The District Court's decree carried to its logical conclusion would allow such recovery.

The very informal nature of the "shares agreement," in which the employees can fish or not as they choose, and presumably can be discharged if the employer cares to expose itself to economic pressure from the union, indicates the contingent nature of the relationship. Similarly the fishermen are entitled to use the boat only when it is available. The fishermen share in the proceeds if there are proceeds. If there is no cause of action because appellant cannot sue himself, appellees have no right to sue.

If appellees by virtue of the "charter party" are employees of an independent contractor or "charterer," appellant is not liable to them because the crew members of the GLORIA R would be likewise not appellant's employees but the employees of a similar independent contractor. Both boats were operated on the same plan.

The specific provisions of the "charter party" preclude appellee Salvatore DiLeva and appellees from recovering from appellant. It defines the contractual relationship, whether it be a contract of employment or a bareboat charter, and provides that appellant shall not be liable "for loss of time or other damage . . . caused by the loss of use of the vessel by any reason whatsoever . . ." Appellees, to recover, must destroy this

specific provision, which is part of the consideration of the contract upon which they rely.

The District Judges, in both of the trials below, erred in disregarding statutory violations of the BESSEMER, when they found the GLORIA R in sole fault. These violations of the International Rules of the Road for the Prevention of Collisions at Sea are (A) failure to have a lookout with the sole duty of a lookout; (B) negligence in a special circumstances situation by failing to respect fishermen's custom as to a red masthead light, and (C) failure to exhibit the prescribed white masthead light.

Appellees must prove not only (1) that these violations did not contribute to the accident, but (2) under the *Pennsylvania* rule, that they *could not have been contributing causes.*

No issue has been raised by appellees as to the white light of the GLORIA R. The implication is that the GLORIA R was also without a white masthead light. In this event a mutual fault finding would be indicated.

If this is a mutual fault case, half damages would be all that could be allowed, provided the crew have the right to sue at all. In cases in which they have such a right, such as the lost personal effects cases, half damages have been awarded when the crew's vessel is in mutual fault with the vessel from which recovery is sought.

The District Court awarded damages to appellees for loss of ten days' time. This is a windfall of twenty percent because loss of only eight fishing days was demanded in the libel and proved. Damages for loss of fishing time should be proved with certainty because appellees were engaged in the "highly speculative pursuit of sardine fishing." Proof was not made with any degree of certainty, and any award of damages can be based only upon mere guess, speculation and surmise.

ARGUMENT.

I.

There Is Slight if Any Presumption of Correctness of the District Court's Decree.

Appellant recognizes the usual rule that on appeal the District Court's decree will be presumed correct in the absence of a showing of clear error. This case, however, does not follow the usual pattern because there were two complete trials below, before two District Judges, each of whom reached a different result. The transcript of the testimony in the first trial, before Judge Harrison, appears in the record at pages 206 to 312; the transcript of the evidence in the second trial is printed at pages 60 to 205. The first trial culminated in Judge Harrison's Memorandum Opinion [A. 14], which states in effect that appellees' action was commenced against the wrong party. The Judge amplified his opinion in the colluquy between Court and counsel [A. 316] in which he stated definitely that if appellant remained in the case as sole respondent, the Court's decree would be for appellant.

At the second trial no proof was offered against Gennaro DiLeva, who was added as respondent at the Court's suggestion. The evidence duplicated the matters and issues previously covered and the opposite result was reached, so far as appellant's liability is concerned.

In this situation, appellant submits that there can be no presumption that Judge Hall's views should prevail in preference to those of Judge Harrison.

II.

The District Court Erred in Finding That Appellees Had a Cause of Action Against Appellant.

Assignments of Error applicable:

IX. The Court erred in not finding that the libelant's fifth amended libel did not state a cause of action against respondent Van Camp Sea Food Company, Inc.

X. The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial of this cause.

XI. The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XII. The Court erred in proceeding to a second trial upon the identical issues before the Court in the prior trial to allow libelants to join an additional party not before the Court at the time of the first trial.

XIII. The Court erred in allowing the second trial to proceed without proper order allowing addition of a new party.

XIV. The Court erred in regarding the memorandum opinion of the District Judge who presided at the first trial, as an order vacating the prior proceedings, when such memorandum opinion purported merely to allow additional proceedings as to the legal effect of an alleged charter party, and a determination of the status of the fishermen aboard both fishing vessels.

XV. The Court erred in overruling respondent's exceptions to libelant's Fifth Amended Libel.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc. is liable

for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libelant is entitled to recover from respondent Van Camp Sea Food Company, Inc. the following sums on behalf of himself and the following crew members as damages and loss of earnings:

Ivan Jurjev	$239.22
Mario DiLeva	239.22
Mike DiLeva	239.22
Jack Olsen	239.22
Marino Transatti	239.22
Angelo Castagnola	239.22
Chigi Romolio	239.22
Salvatore Carnevale	239.22
Matteo Bologna	239.22
Pasquale Guglielmo	239.22
Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

A. APPELLEES WERE EMPLOYEES OF APPELLANT.

This position has been consistently maintained by appellant. Witness Gerstle, paymaster for appellant, described the relationship between appellees and. appellant [A. 178, 298], under a "share basis" or fisherman's lay. The total catch of fish was reduced to dollars at the then market price of $22.00 per ton. Operating expenses, fuel, oil, dockage, various dues were paid by the owner and charged to the gross catch. The balance was divided by the total number of "shares", in the case of the BESSEMER,

18¾ shares. The boat took 2¾ shares and the net 2½ shares. Groceries were then apportioned among the remaining 13½ master's and crew's shares, social security and withholding taxes were deducted, appellant paid the employer's social security tax and the balance was paid to the master and the crew. The Master of the BESSEMER testified [A. 89-96] that originally his father Salvatore DiLeva took the boat under a charter party agreement [A. 90-94] and that after its expiration, operation of the boat continued "all the way through" on the same terms up to the date of the accident. The agreement provided for delivery of all fish caught by the vessel to appellant. It provides further that the "Charterer," appellee Salvatore DiLeva, shall employ all of the crew of the vessel. There is nowhere any reference to control of details of the fishing and operation of the vessel but the clear implication is that the vessel's activity was controlled by the "Charterer" limited only by the provision that it was to engage in the "fishing trade in waters immediately adjacent to San Pedro in waters usually fished by vessels fishing therefrom" and that it was not to engage in illegal operations or in waters prohibited to vessels of its type, and that all of its catch be delivered to appellant.

The cases of

Cromwell v. Slaney (C. C. A. 1st 1933), 65 F. (2d) 940, 1933 A. M. C. 1514,

and

Loe v. Goldstein (C. C. A. 9th 1939), 101 F. (2d) 967, 1939 A. M. C. 627,

are pertinent to show the difference between a fisherman's lay arrangement sufficient to constitute the captain as a

charterer pro hac vice and one in which the employer-employee relationship exists.

The First Circuit Court of Appeals in the *Cromwell* case stated,

> ". . . where the captain employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch and settling all the bills, he becomes the owner *pro hac vice* and that crew is in the employ of the master and not of the owner. (Citing cases.)"

This Court, in the *Loe* case applied the same test to determine if the fishermen were employees of the owner. Loe was appointed by the owner as "fishboss", and one Ball as captain, each receiving a fisherman's share of the catch plus five per cent of the boat's share of twenty per cent. The "fishboss" and captain directed where, when and how to fish and hired the crew. The crew decided where the fish was to be sold and paid the expenses of the trip. It was held that the jury was to determine whether the entire command of the vessel was relinquished to the "charterer" and that it was error for the District Court to direct a verdict for defendant. Emphasis was placed upon the fact that Loe received a five per cent share of the boat's share "for running the boat." This was sufficient to justify the conclusion that in running the boat he was doing so as agent of the owner.

The "charter party" in this case limits the crew to selling and delivering fish to appellant. It is appellant's belief that these fishermen were employees, despite the use of the language of the bareboat charter [A. 90-94] and the description of appellees' practice [A. 292], "That we

run the boat and that we do all the hiring and firing, and that we bring in the boat as best we can—go out fishing, bring in the fish for them and that we hire the crew and we put on our own nets and when we make count on pay-day, they take so much and the boat takes so much of the shares."

The parties are in agreement that the fishermen can quit when they choose [A. 306, 291]. DiLeva states that discharge of a fisherman exposes him to suit for wages for the balance of the season. Gerstle indicated that economic pressure from the Union prevented discharge of the fishermen.

Fishermen "on shares" are nonetheless employees entitled to seamen's rights in the event of personal injury.

> *Strom v. Montague* (W. D. Wash. 1944), 53 Fed. Supp. 548, 1944 A. M. C. 122;
>
> *Blue Sky* (*Mason v. Evanisevich*) (C. C. A. 9th 1942), 131 F. (2d) 858, 1942 A. M. C. 1542;
>
> *Nolan v. General Sea Foods Corp.* (C. C. A. 1st 1940), 112 F. (2d) 515, 1940 A. M. C. 1410.

The question of whether fishermen "on shares" were employees of the owner for tax purposes was raised in the case of

> *O'Hara Vessels, Inc. v. Hasset* (D. C. Mass. 1942), 60 Fed. Supp. 672, 1945 A. M. C. 1108.

and the conclusion was reached that the owner was not entitled to a refund on the claim that they were not employees. It is to be noted here that appellant paid the social security taxes and withholding taxes for appellees, as for any other employees.

No clear position was ever taken by appellees that they were employees of appellant [A. 73-76] but the District Court at the termination of the second trial found that appellant had employed appellees [A. 42]. The Memorandum Opinion concluding the first trial found [A. 15] that they were not employees. On this point appellant agrees with Judge Hall and disagrees with the conclusion reached by Judge Harrison.

B. Employees on a Share Basis Do Not Have a Right of Action Against Their Employer for Loss of Time Due to a Collision With Another Vessel Commonly Owned.

To examine the proposition it is necessary to determine who is the owner of the cause of action for detention arising out of a collision, when the vessel involved is being operated "on shares." The "shares agreement" is today confined to fishing, whaling and sealing ventures but in the early days all seamen's service agreements were contingent upon the ship actually earning freight. Nineteenth century cases are therefore particularly appropriate. They hold that the sole ownership of the cause of action is in the owner of the vessel and that the crew does not have any right to sue.

In the case of

Baxter v. Rodman (1826), 3 Pick. (Mass.) 435,

the owner of a whaler sued another whaler for the proceeds of a voyage engaged in jointly under a contract of mateship. The defendant objected urging that there was a defect of parties plaintiff because the officers and crew "on shares" on plaintiff's whaler were not joined. Defendant urged that the officers and crew were co-owners

of the cause of action and therefore were necessary parties. The Court rejected the argument stating,

> "That every seaman should be tenant in common with all the other seamen, the master and the owners of the vessels in all the oil which may be taken on a whaling voyage, so that no action could be brought respecting it without joining all, and none could be sued without the whole, giving every seaman a right to discontinue the action, or to release the claim, or to receive payment for the whole, would be a state of things not suspected by the enterprising men who have carried on the whale industry. But we think it is not the law."

In the case of

Grozier v. Atwood (1826), 4 Pick. (Mass.) 234,

the converse case was presented. The officers and crew "on shares" joined with the owners in an action to recover their claimed share of a joint voyage with another whaler. The Court nonsuited plaintiffs because there was a misjoinder of parties plaintiff (officers and crew) who had no right to sue, alone or with the owner.

In the case of

Lewis v. Chadbourne (1865), 54 Me. 484,

the "proceeds of the voyage" were mackerel caught on a voyage during which the plaintiff was a fisherman "on shares." The Court held that the fisherman had no right to sue a sheriff because of a loss sustained when an attachment was lost through the sheriff's neglect. The theory was that the *sole* right to sue for the proceeds of the voyage in this kind of case was in the owner of the vessel.

The respondent in the case of

Taber v. Jenny (D. C. Mass. 1856), 23 Fed. Cas. (No. 13720) 605,

accomplished the incredible feat of stealing a whale. The owners of the whaler sued the converter who urged that the crew members of the vessel who had been working "on shares" were necessary parties who had not joined. The Court held that the *sole* right to recover for the proceeds of a voyage on shares was in the owner and that the seamen have only the right to share in the "net avails." Of course, the owner has the duty to pursue the wrongdoer, said the Court, because otherwise, the seaman could obtain no redress. *"He could maintain no action for it."*

This Court, in the case of

The Lydia (*U. S. v. Laflin*) (C. C. A. 9th, 1928), 24 F. (2d) 683, 1928 A. M. C. 700,

cited the preceding cases with approval in deciding that the owner of the vessel could sue for and recover the entire proceeds of a voyage on shares, more specifically damages for interference with a whaling voyage. The owner of the vessel sued the United States for lost profits of a voyage with which a Navy patrol interfered. The United States offered, as a partial defense, the argument that damages to the owner should be reduced by the amount which the owner would have to pay the crew under the lay or share agreement. This Court rejected the argument stating,

> "It is well settled that in whaling ventures the sailors who have a certain lay or share in the proceeds as wages are never regarded as partners with the owners, though they may participate in the profits of the voyage, and *it is equally well settled that neither*

> *the officers nor members of the crew may join with the owners in a recovery of the proceeds of the voyage,* and that *the owners of the vessel and the projectors of the voyage are the owners of the products thereof."* (Italics added.)

The Court goes on to show that the very reason that the owner alone can sue is because the crew have no right to sue on their own behalf—they have no "title" to the cause of action.

The Court adds that the owner, having sued a third party and recovered for damage to or loss of the catch, holds the proceeds of the suit just as he holds any other proceeds of the voyage, in trust, to divide with the crew members in accordance with their contractual rights to share in the "net avails" of the voyage. The trust *res* in this situation is either the amount recovered from the third person or the cause of action against him. The rights of the fishermen to share in these proceeds stems from their contract of employment, the "charter party" ("5. The net proceeds earned by the said vessel . . . shall be divided . . ." [A. 91]), under the terms of which they were operating [A. 95]. If the owner prosecutes a cause of action against a third party and recovers, the fishermen's shares are determined by the amount thus realized. If the owner recovers nothing, because he has no cause of action against the third person, the fishermen likewise can make no recovery. Their rights are entirely dependent upon the owner's right of recovery. Their rights exist only through the owner, not independently of him. If the owner has no cause of action, the members of the crew have none.

In a *dictum* in the case of

Mobile R. R. Co. v. Jurey (1884), 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 570,

the Supreme Court said,

". . . when two ships belonging to the same owner came into collision with each other, and one of them became a total loss, it was held that the insurers of the lost ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault for the collision, for their right existed only through the owner of the ship insured, and not independently of him." (Citing

Simpson v. Thompson (1876), 3 App. Cas. 279

and

Globe Ins. Co. v. Sherlock (1874), 25 Ohio St. 50).

Similarly, here, where the fishermen's rights exist only through the owner and to the extent that the owner has rights, the inquiry is properly concerned with what rights the owner has, and what rights the fishermen can compel the owner to assert.

It is claimed that the layup of the BESSEMER was due to fault of the GLORIA R. If the GLORIA R were independently owned, *appellant* (not appellees) would have a cause of action against her *in rem* and against her owner *in personam*. But before appellees have any right to share in the proceeds of the vessel, *i. e.*, the cause of action, they must show that there is a cause of action. Such a showing would require appellees here to establish that appellant as owner of the BESSEMER can sue itself as owner of the GLORIA R.

Appellees will undoubtedly refer to the case of

The Petrel (1893), P. 320 (41 Dig. 921, 8116),

upon which they relied below. The crew of the PETREL was allowed to recover from the owner of a ship solely at fault which collided with their ship and caused loss of their personal effects. It so happened that the two colliding ships were commonly owned and they were therefore suing their own employer. The holding was that negligence of the offending ship was not negligence of fellow employees of which the crew of the ship not at fault took the risk. The Court acknowledged that there might be instances where they were fellow employees,

> "for example it might [be negligence of a fellow servant] if all the ships of the same company were in the habit of meeting in the same dock and the safety of each thus became in the ordinary course of things dependent on the skill with which the other was navigated."

Under the circumstances of this case, where appellant's fishing boats are all engaged in the common pursuit of fish "in the waters immediately adjacent to San Pedro and usually fished by vessels fishing therefrom" (see "Charter Party" [A. 90]), the Court might well have reached the opposite result. In any event we have an entirely different case. The PETREL's crew owned their personal effects. Appellant only, owns the right to sue for lost proceeds, if any such right were to arise. Appellees do not own it.

The agreement to share the "net proceeds of the voyage," is in effect a profit sharing agreement. The proceeds and the profits belong to, and are derived from, the owner. The owner agrees to share the profits with the

crew. Before there is the duty to share the profits there must be a showing that there are profits. When two boats of the same ownership collide, the owner has made no profits. He has suffered a loss to the extent that each boat is damaged, and for the time that each boat is unable to fish. If there are no profits, either in the money value of fish, or in the fish themselves, or in a cause of action against a third person, there can be nothing to share. Nothing divided by 18¾ is nothing. The District Court, by its decree in the second trial, created a right where none existed before, and did violence to the existing law and theory of causes of action. The Court allowed recovery simply because the fishermen had suffered a loss. Under the Court's ruling, not only must the owner bear his own loss, but he becomes liable to his crew for their share of hypothetical profits which the owner did not in fact make, but which the Court found he would have made but for the collision. This result, appellant submits, is entirely inconsistent with the contractual rights of the parties.

An entirely new and unwarranted field of recovery is opened to employees by the District Court's decree. If the decree is correct, it is authority for the proposition that the fishermen should recover for loss of fishing time if through negligence of their own navigator the vessel grounds, or if the engineer fails to keep the engine operating and the vessel has to return to port. The fishermen have likewise then lost their opportunity to fish. If any employee on wages, fixed or contingent, is unable to work due to damage caused by accident in another department, he also has suffered a wage loss. If we assume that the BESSEMER, instead of running into the GLORIA R, had run into appellant's fish conveyer and damaged it throw-

ing appellant's cannery employees out of work for a week, during repairs, appellant could be held liable for damages to the employees for their loss of a week's wages, if the reasoning of the District Court is correct.

Appellees were at any time entitled to quit [A. 306]. It follows, even though their discharge might bring economic pressure from their union, that the owner could, as a matter of law, fire them at any time or discontinue fishing. Appellant offers to the Court the thought that the "shares arrangement" was in effect a relationship in which there was a rather loose contract of employment in which the fishermen were never obligated to fish at any time. They could fish or stay home as they chose [A. 294]. As can be seen from Respondents' Exhibit B, Ivan Jurjev was not aboard during the period covered by deliveries of October 14th to October 18th and the division was on an 18¾ shares basis. From October 19th to October 25th there were fourteen crew members and 19¾ shares. October 27th and October 28th deliveries were not shared by Pietro Colombo. They "missed the boat" for one reason or another, and did not share the profits for those periods. The very informality of the arrangement, even when it is examined in the light of the "Charter Party," shows that the fisherman's wage is entirely contingent upon profits being earned. The hazards and uncertainties of fishing make any other arrangement unsatisfactory. "All sardine boats are run that way," says Witness Gerstle [A. 298]. Analysis of the contract shows it to be by no means a guaranty on anyone's part that the fishermen will fish or that they will earn anything. Therefore while the vessel was out of service for eight days, there was nothing to prevent appellees from seeking other employment.

Nor is there any obligation, express or implied, for appellant to do more than allow appellees to use the boat when it was available. Appellant can elect to tie up the boat for maintenance, bottom painting, or repairs without incurring any liability. Surely the contract should be construed so that each of the parties to it have the same right not to take the vessel out or not to have the vessel engage in fishing. If, for instance, appellant had enough fish at any time, and decided that all or some of its vessels should not go fishing for a certain period, can appellees or any of the other fishermen in the fleet sue for lost wages during their lay-off? There is no difference between the situation in which the boat is not available to appellees because of alleged negligence of another boat of appellant's fleet, and a situation in which it does not fish because of lack of cannery facilities, or breakdown for any cause, including negligence, which results in the boat's catch not being required. Appellant takes the risk of appellees' willingness to fish on any given day. Appellees, likewise, take the risk of the availability of the boat for any given time.

C. Both Boats Were Operated Upon the Same Share Arrangement and Both Crews Had the Same Relationship to Appellant.

Witness Gerstle indicated [A. 177, 179, 306] that *all* sardine boats are operated under the identical "shares" plan, the only variant being the number of shares which changed with the number of the crew members. Anthony

DiLeva (GLORIA R) states [A. 239] that their regular boat was broken down and they were "just chartering" the GLORIA R during repairs.

This factor explains much of appellees' vacillation as to their exact status. Appellees realized the dilemma presented. To establish liability upon appellant (and cash in, at the owner's expense, on the alleged negligence of their own relatives), the master and crew of the GLORIA R had to be shown to be appellant's employees. Appellees, then also must be considered employees, and under the consistent holding of the "share agreement" cases the employees had no right to sue. If appellees were "charterers" or employees of a "charterer," the GLORIA R crew were also not employees. Appellant is then not liable to appellees, because the doctrine of *respondeat superior* would not apply.

Judge Harrison concluded that both crews were employees of independent contractors, but instead of dismissing the action against appellant, allowed appellees to *amend* by bringing in the "charterer" of the GLORIA R. Appellant considers this procedure to be erroneous because an action brought against an improper defendant or respondent should be dismissed.

Judge Hall, after no evidence whatsoever was introduced concerning the alleged "charterer" of the GLORIA R, dismissed as to him but found both crews to be employees of appellant. Judge Hall's decree is erroneous because it is directly opposed to the "shares agreement" cases quoted with approval by this Court in the *Lydia* case (*supra*).

III.

Appellees Have No Cause of Action Against Appellant Because of the Specific Provision of the "Charter Party," Barring Claims for Loss of Use.

Assignments of error applicable:

VIII. The Court erred in denying respondent Van Camp Sea Food Company, Inc.'s motion to dismiss this action against this respondent.

X. The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial [126] of this cause.

XI. The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc., is liable for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libelant [127] is entitled to recover from respondent Van Camp Sea Food Company, Inc., the following sums on behalf of himself and the following crew members as damages and loss of earnings:

Ivan Jurjev	$239.22
Mario DiLeva	239.22
Mike DiLeva	239.22
Jack Olsen	239.22
Marino Transatti	239.22
Angelo Castagnola	239.22
Chigi Romolio	239.22
Salvatore Carnevale	239.22
Matteo Bologna	239.22
Pasquale Guglielmo	239.22
Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

Appellant refers specifically to the provisions of the "Charter Party" set forth at pages 90 to 94 of the Apostles. Anthony DiLeva (BESSEMER) testified definitely that appellees took the BESSEMER on September 11, 1941, under the agreement, continued to run the vessel until the agreement expired by its terms and thereafter operated in accordance with the agreement [A. 95]. No other agreement was ever made with appellant [A. 89, 94, 95]. Counsel for appellee stated [A. 209] that the agreement continued in force, on oral understanding, and that there was no different subsequent agreement.

The "Charter Party" provides [A. 93]:

> "8. Neither party shall be liable to the other for any loss of time or other damage, other than damage to the vessel or machinery, caused by the loss of use of the vessel by any reason whatsoever including defects to hull or machinery."

It is signed by appellant and appellee, Salvatore DiLeva.

In considering this clause it is not necessary to determine whether the agreement operates as a true bareboat charter or merely as an employment agreement cast in the general form of a bareboat charter. In either event it is an agreement made freely and voluntarily between the parties. Part of the consideration for the agreement was this covenant against liability for detention damage given by appellee, Salvatore DiLeva, to appellant.

The final decree [A. 46] from which this appeal is taken is in favor of appellee, Salvatore DiLeva, who in the Fifth Amended Libel [A. 17] sued on behalf of the crew members. Their rights, if he is a "charterer" proceed through him and are no better than the right he asserts to sue for detention damage. If they are employees of appellant, it is nowhere asserted, nor can it be, that the relationship between appellant is different from the relationship specified in the written agreement. Quite definitely the position is maintained that the written "charter party" identified and governed their operations. It was the "same thing; yes, all the time. All the way through" [A. 95].

Appellees' rights to a share of the net proceeds of the catch of the vessel, if any exist, arise out of contract. The parties by specific agreement having provided that "loss of time or other damage . . . caused by the loss of use of the vessel by any reason whatsoever" shall not

be an item for which appellant shall be liable, no cause of action for this very damage can now be asserted without destroying the contract. Appellees cannot on the one hand urge that part of the contract is in force to give them the right to shares and on the other that the balance of the contract is ineffective.

If the "charter party" actually created a bareboat charter relationship between appellant and appellee, Salvatore DiLeva, the right to sue is likewise defined by the agreement. Salvatore DiLeva, then the owner of the vessel *pro hac vice,* has title to the cause of action of his crew members. But, this cause of action is for detention damage, and, specifically, an item for which appellant was agreed not to be liable. Therefore, Salvatore DiLeva, neither for himself nor for his employees, has any right to maintain this action. If we assume that the BESSEMER's crew were employees of a "charterer" it follows that the crew of the GLORIA R, being on an identical shares arrangement with appellant, are also employees of an independent contractor, Gennaro DiLeva. He, not appellant, would be liable. This is the view taken by Judge Harrison after the first trial. Appellees were given the opportunity of asserting this position in the second trial. Not having done so, the action against Gennaro DiLeva was dismissed because "his name has not been mentioned by any of the witnesses" [A. 133].

IV.

The District Court Erred in Finding That the Gloria R Was in Sole Fault for the Collision.

Assignments of Error applicable:

I. The Court erred in finding that it is true that the BESSEMER was proceeding, at the time of the collision referred to herein, with all running lights burning.

II. The Court erred in finding that it is true that at the time of the collision the BESSEMER was ready to make a set but had not commenced to make the set nor lowered the net to the skiff.

III. The Court erred in finding that the GLORIA R was negligent or that her master or her crew was negligent in their operation or navigation of said vessel at or prior to the time of said collision between the BESSEMER and the GLORIA R, in turning and crossing the bow of the BESSEMER or in any other respect.

IV. The Court erred in finding that the collision between the BESSEMER and the GLORIA R was directly and proximately or in any other manner caused by negligence of the GLORIA R.

V. The Court erred in finding that as a proximate result of such alleged negligence, the BESSEMER was laid up for repairs.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc., is liable for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the

BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libelant is entitled to recover from respondent Van Camp Sea Food Company, Inc., the following sums on behalf of himself and the following crew members as damages and loss of earnings:

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Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

In considering this question appellant recognizes that two District Judges have heard the oral testimony of the witnesses and have reached a conclusion opposed by appellant. Appellant accepts the burden of showing that this conclusion is manifestly erroneous. Both District Judges committed errors of law, which are sufficient to require reversal. The BESSEMER is chargeable with statutory vio-

lations which it must be shown, not only did not cause the collision but *could not* have caused the collision:

A. The BESSEMER had no lookout whose sole duty was to be alert for other vessels.

B. The BESSEMER failed to exercise due care in a special circumstances situation.

C. The BESSEMER failed to exhibit a white masthead light as required by Article Two of the International Rules.

In discussing the question of liability appellant points out that appellees have chosen not to produce their wheelsman, appellee Salvatore DiLeva, nor their engine controls operator, appellee Mike DiLeva, nor the man on the bow, appellee Chigi Romolio. At the first trial Salvatore DiLeva was conveniently ill [A. 292], Chigi "could not come" [A. 233] and no explanation for Mike DiLeva's absence was offered. At the second trial Salvatore DiLeva was "in the mountains" [A. 103]. No suggestion was made that the other two essential witnesses were not available. While it may be quite possible that the testimony of these witnesses, whom appellant did not call, may have corroborated in every detail that of the mastman, it seems more than mere coincidence that on neither of two occasions were we able to hear from three men in "key" positions. Surely in the seventeen months between the two trials they were available for depositions. This is not a situation such as this Court had before it in the case of the

> *Eureka* (C. C. A. 9th, 1935), 80 F. (2d) 303, 1935 A. M. C. 1560,

in which the facts, in the main, were undisputed, but a case in which a sharp conflict exists, and one in which the

Court should have been entitled to question the helmsman, controls operator and bowman of *both* vessels as to what they did. Appellant offered the oral testimony of the men in the corresponding position on the GLORIA R. Having chosen not to produce these men, appellees cannot complain if this Court should presume their testimony to be unfavorable.

> *The Cananova* (E. D. Pa., 1923), 297 Fed. 658, 662.

A. THE BESSEMER HAD NO LOOKOUT WHOSE SOLE DUTY WAS TO BE ON THE ALERT FOR OTHER VESSELS.

Article 29 of the International Rules (33 U. S. C. A., Sec. 121) provides:

> "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect . . . to keep a proper lookout. . . ."

In the case of the

> *Arkansan-Knoxville City* (C. C. A. 9th, 1940), 112 F. (2d) 223, 1940 A. M. C. 562,

this Court stated that it would follow the rule of

> *The Ariadne* (1872), 80 U. S. (13 Wall.) 475, 20 L. Ed. 542,

i. e., "A lookout must be a free and single minded lookout." This principle was reasserted in the case of

> *Koyei Maru-David P. Fleming* (C. C. A. 9th, 1938), 96 F. (2d) 652, 1938 A. M. C. 885.

See also the cases of

Wilders S. S. Co. v. Low (C. C. A. 9th, 1901), 112 Fed. 161, 172,

in which absence of a lookout to see what was there to be seen was characterized as approaching "very nearly the line of reckless navigation";

Union S. S. Co. v. Latz (C. C. A. 9th, 1915), 223 Fed. 402, 411,

where the failure of a lookout was held to be a "grievous fault for which the vessel will be rendered liable"; and the case of

The Catalina (Wilmington Trans. Co. v. Edwards) (C. C. A. 9th, 1938), 95 F. (2d) 283, 1938 A. M. C. 485,

in which it was reiterated that a "competent and vigilant lookout stationed at the forward part of the vessel and in a position best adapted to descry vessels approaching at the earliest moment is indispensable to exempt the steamboat from blame in case of an accident in the nighttime, while navigating waters on which it is accustomed to meet other water craft."

Applying these well defined rules to the BESSEMER, we find that the mastman's "job" was to "look for fish" [A. 98]. Appellee DiLeva, the mastman, indicated that he was quite interested in getting the fish he was pursuing, was looking at the fish and the GLORIA R simultaneously [A. 99]. Appellee Carnevale, who was on the pilot house, was also watching the fish [A. 233, 128, 116]. The entire crew was also definitely interested in the school of fish [A. 271]. The wheelsman's duty was to follow the orders of the mastman [A. 127]. Presumably the bowman is

also on the lookout for fish. The entire picture on the BESSEMER is one of intense concentration on capturing the school of fish, with no care or concern for other vessels in the vicinity.

What, then, of the duty of the lookout which is of "the highest importance"? We say with the Supreme Court in the *Ariadne (supra):*

> "Every doubt as to the performance of the duty and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony condusive to the contrary."

B. THE BESSEMER FAILED TO EXERCISE DUE CARE IN A SPECIAL CIRCUMSTANCES SITUATION.

Article 29 of the International Rules (33 U. S. C. A., Sec. 121) is the general precautionary rule, providing:

> "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of . . . the neglect to carry . . . signals . . . or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstance of the case."

If this is a special circumstances situation rather than a crossing situation the BESSEMER is at fault in performing the admittedly unusual clockwise circle rather than the expected counterclockwise maneuver, without care for the proximity of the GLORIA R. We can see no justification for abandoning all precaution in their anxiety to capture the school of fish they were pursuing.

The BESSEMER failed to give adequate or any warning that she was "on fish." It is admitted that the BESSEMER had no light of any kind or color on its masthead. The GLORIA R witnesses are positive that the "San Pedro custom" requires a red light on the mast during circling operations to indicate that the boat is "on fish" [A. 142, 154, 163, 165, 171, 245, 251, 282, 288]. The BESSEMER witnesses indicate that the red light is lighted only when the net is being lowered [A. 96, 117, 231, 257]. Some indication of why the BESSEMER preferred not to light her red masthead light appears from the testimony of Salvatore Carnevale [A. 118], who says that showing a red masthead light is likely to attract to the area other vessels which might prove unwelcome competitors.

While as we shall see in the discussion under the next subdivision, the red masthead light has no propriety under the International Rules, its only possible purpose would be to give a warning to other vessels to keep clear, and the BESSEMER's failure to give such warning can hardly be justified by the fear that it might be taken as an invitation to come over and share her prospective catch.

C. THE BESSEMER FAILED TO EXHIBIT A WHITE MASTHEAD LIGHT.

Article 2 of the International Rules (33 U. S. C. A., Sec. 72) provides:

> "A steam vessel when under way shall carry—(a) on or in front of the foremast . . . a bright white light . . . of such a character as to be visible for five miles."

No argument is made that the BESSEMER had such a masthead light [A. 230]. In fact, the reason is advanced [A. 118] for not having such a light, that it "shines too much white" and the phosphorescence of the fish cannot be seen.

This Court in the case of

> *Martindale-Yankee Clipper (Kaseroff v. Petersen)* (C. C. A. 9th, 1943), 136 F. (2d) 184, 1944 A. M. C. 701,

condemned in no uncertain terms the practice or custom of fishing without a white masthead light. It is to be noted that the MARTINDALE was *preparing* to set her net (just as was the BESSEMER) when she exhibited her red masthead or "setting" light. But the BESSEMER showed no light whatsoever! If a red light was not the equivalent of or substitute for the statutory requirement, what of the situation when *no* light is shown! This Court applied the rule of the

> *Pennsylvania* (1874), 86 U. S. 125, 136, 22 L. Ed. 148,

and found that the MARTINDALE had the burden of proving not only that the statutory violation did not contribute, but also that it *could* not have been one of the causes of the collision. Both vessels, having committed the same violation, were held to be in mutual fault.

In this case it is obviously impossible for the BESSEMER to show that her failure to obey the law with respect to her masthead light could not have contributed to the col-

lision. Such a light would surely have assisted in determining the position and course of the BESSEMER. If fishermen choose to disregard the rules because it interferes with their fishing, they must accept the consequences of their conduct. If the law is burdensome to them, they must obtain relief from Congress. They cannot expect the courts to exonerate them from deliberate violations of express statutory requirements.

No particular issue was made by appellees in the case at bar as to the masthead light on the GLORIA R. The implication from the testimony of the master of the GLORIA R [A. 239] is that her lights consisted of "just the running lights, starboard and port lights." If we assume that the GLORIA R was also following the custom of running without a white masthead light, the reasoning of the *Martindale-Yankee Clipper* case *(supra)* should require a finding that both vessels were at fault, and that the District Court erred in finding sole fault upon the GLORIA R.

V.

If the Court Regards the Vessels in Mutual Fault Recovery of Half Damages Is the Most That Could Be Allowed.

Assignments of Error applicable:

VII. The Court erred in finding that the loss of earnings, proximately caused by the layup of the BESSEMER, was the sum of $239.22 to each of twelve crew men, the sum of $363.53 to the master, Anthony DiLeva, and the sum of $621.65 to the owner of the net on the BESSEMER, Salvatore DiLeva.

In

> *Halsbury's Laws of England,* 2d Edition (1938), Vol. 30, p. 865, Sec. 1146,

under the heading "Crews on Vessels" appears the statement,

> "The Master and crew of a vessel, who lose their effects by reason of a collision due to the negligence of some of them, cannot recover the value from the owners of their own vessel, because of the doctrine of common employment (*Priestly v. Fowler* (1837), 3 M. & W. 1; *Hedley v. Pinkney & Sons S. S. Co.* (1894), A. C. 222, 41 Dig. 297, 1591). If the collision is due to the fault of both vessels, they can apparently, even if they are wrongdoers, just like their own wrongdoing owner, recover from the owner of the other vessel if his vessel was in fault; and the amount of damage by which the proportion of the other vessel's fault exceeds the proportion of their

own vessel's fault. (Maritime Convention Act 1911 (1 & 2 Gro 5 C 51 S 1 (1) 'or to any property on board').

"If the other vessel is alone to blame, they can recover the full value even though both colliding ships belong to the same owners (The Petrel 1893 P. 320; 41 Dig. 921, 8116). If their vessel was not to blame, but the collision is the fault of two or more other vessels, the Maritime Convention Act applies and it has yet to be decided whether they are entitled to recover from the owners of each of the other vessels in full or only in proportion to the degree in which each vessel was at fault."

In the case of

In re Lakeland Transportation Co. (E. D. Mich., 1900), 103 Fed. 328, 336 (modified on other grounds (C. C. A. 6th, 1901, 111 Fed. 601),

the master and crew of a vessel in mutual fault, were entitled only to half damages because they were "tainted with the fault of their vessel."

In the case of

The City of New York (S. D. N. Y., 1885), 25 Fed. 149,

recovery of half damages for personal effects was allowed the master and crew because they were chargeable with the fault of their own vessel.

To the same effect are the cases of

The Livingstone (W. D. N. Y., 1900), 104 Fed. 918, 924 (reversed on other grounds (C. C. A. 2d, 1902), 113 Fed. 879);

The Queen (S. D. N. Y., 1889), 40 Fed. 694.

In the case of

The Niagara (S. D. N. Y., 1896), 77 Fed. 329 (affirmed (C. C. A. 2d, 1898) 84 Fed. 902),

recovery was likewise limited to half damages from the other vessel, but because the fault of their own vessel consisted of unseaworthiness, in the lack of a mechanical fog horn, which existed at the beginning of the voyage, the crew was entitled to recover from their own owner for the other half of their damage.

The foregoing cases, it is to be noted, involve a situation in which there is no question as to the title of the master and crew to their personal effects and to their right to sue. In the case at bar there is no showing of such a right to sue or "title" to the claim for lost profits. But even accepting for the sake of argument, the assumption that a recovery can be made of detention damages arising out of a collision with a vessel belonging to the same owners, where as here, the collision was due to the fault of both vessels, half damages, not full damages, would be the limit of such recovery.

VI.

The District Court Erred in Computing Damages.

Assignments of Error applicable:

VII. The Court erred in finding that the loss of earnings, proximately caused by the layup of the BESSEMER, was the sum of $239.22 to each of twelve crew men, the sum of $363.53 to the master, Anthony DiLeva, and the sum of $621.65 to the owner of the net on the BESSEMER, Salvatore DiLeva.

One minor objection to the final decree to which we refer in passing is that it is indefinite in that it does not purport to be in any final amount. The decree requires that lawful social security taxes and withholding taxes be deducted. This is in accordance with the ruling of this Court in the case of

> *Resukich v. City of Avalon* (C. C. A. 9th, 1946), 156 F. (2d) 500, 1946 A. M. C. 1009.

While computation of the specific sums intended may be only a mechanical matter, it would seem necessary that the final decree be for a specific sum. Satisfaction of the decree can be then entered upon payment of a sum certain.

The error in computing damages is much more fundamental. The libel seeks recovery for loss of eight fishing days [A. 20]. The answer admits that the BESSEMER was laid up for a period of eight fishing days. The District Judge, at the suggestion of counsel for appellees [A. 196], determined that ten calendar days were lost. Actually there were nine calendar days lost from October 4, 1944, because the boat fished on October 13, 1944, and made a delivery on October 14, 1944 [A. 131]. Sardine boats do not fish on Saturday nights or Sunday mornings because

the canneries are not open for deliveries on Sundays. The actual lost nights consequently are October 4, 5, 6, 8, 9, 10, 11 and 12 or a total of eight nights. This amounts to an error of twenty per cent.

The District Court preferred to fix damages rather than to refer them to a Commissioner.

The Court assessed damages by the following method [A. 194]:

1. The BESSEMER's catch for the balance of October (896,850 pounds) and the entire month of November (1,047,450 pounds) was totaled to obtain the figure of 194,430 pounds [A. 200].
2. This figure was divided by 45 as the approximate number of calendar days for that period [A. 200] to get an average daily catch of 43,206 pounds.
3. The average daily catch was multiplied by ten (not nine) calendar days to get 432,000 pounds or 216 tons, lost during the layup period [A. 196].
4. This figure was multiplied by $22, the market price per ton for sardines [A. 86], to get the sum of $4,752 as the gross loss.
5. Counsel were ordered to compute the expenses and arrive at a figure representing the net loss before taxes [A. 198, 205], divide it by 18¾ shares, give 2½ shares to appellee Salvatore DiLeva for the net, 12 shares to the crew, 1½ shares for the master, and 2¾ shares to appellant for the boat [A. 199].

Counsel for appellees in a Memorandum on Damages (not printed in the Apostles) used an agreed operations cost figure of $406.55 for the 45-day period (Oct. 14 to Nov. 30) divided it by 45, multiplied by 10 to get a cost

of fuel for 10 days of $90.34. This figure, deducted from $4,752, resulted in an amount of $4,661.66.

Dividing by 18¾ gave $248.62 per share. Groceries for 45 days cost $550, or $12.22 per day for 13 men or $.94 per man per day. Deducting $9.40 from each share for 10 days' groceries amounted to $239.22 per share. The master's share was one crew man's share plus one-half share (which was charged with no groceries)or $239.22 plus $124.31 or $363.53. The net's share was 2½ times $248.62 or $621.65.

The Findings of Fact, Conclusions of Law and Final Decree, signed by the District Judge exactly as prepared by appellees' counsel, awards damages in the above amounts [A. 41-47].

Counsel for appellant, also in a Memorandum on Damages (not printed in Apostles), pointed out that only nine calendar days were involved from October 4th to October 12th, inclusive. (The BESSEMER fished on October 13th and made a delivery of her catch on October 14th [A. 131].)

Using the District Court's formula (which appellant considers erroneous), based on a 45-day period, the total net recovery should be $2,521.34. Actually there are 48 calendar days in the balance of October and the month of November. Using the 48-day period as a base, the net recovery should be $2,346.24. The detailed computations appear in the Memorandum on Damages, annexed hereto as an Appendix, for the Court's convenience.

Detention damages in the "highly speculative pursuit of sardine fishing" should properly be proved with a reasonable degree of certainty.

Sunlight-St. Mary (N. D. Cal., 1936), 1936 A. M. C. 755.

The testimony of appellee Anthony DiLeva [A. 85] is particularly unsatisfactory as proof to a reasonable degree of certainty. He says that other vessels were coming in loaded, the fishing was good "that season" and, in response to a leading question to an interested witness, agreed with counsel that there was "very good fishing" that week. In the first trial [A. 310] the fish were "running heavy" and "We saw them all come in loaded" with sardines during that period of time. On cross-examination it was admitted that their boat often "misses" even on days when other boats catch full loads. The only remaining evidence purporting to prove damages is Libelant's Exhibit No. 3 [A. 130, 131, 132]. It shows (1) the total gross delivery of sardines in the Los Angeles area of 66,389,680 from October 4, 1944, to October 13, 1944; (2) total deliveries for October, November and December, 1944, by 89, 89, and 92 boats respectively; (3) the BESSEMER's deliveries for October (total and daily), November and December, 1944.

The probable catch of the BESSEMER for October 4th to 12th, inclusive, was estimated by computation based upon its catch during the succeeding one and one-half months.

In the case of

> *The Lansing* (C. C. A. 9th, 1931), 51 F. (2d) 466, 1931 A. M. C. 1470,

this Court refused to approve a similar computation as not "legally sound," "in a measure speculative" and "that there was no legally recognizable standard on which the award could be allowed." There, a whaler was allowed recovery in the District Court for six days' lost time, based upon the catch for the following six days. The whaling venture was in untried waters but the case is

leading for the proposition that proof must be made with certainty in detention damage cases and that such proof cannot be based on subsequent operations. This Court reversed the District Court for failure to prove detention damage.

In the case at bar there is no showing of catches, during the period, of other vessels of similar size and type in the same area. Exhibit 3 [A. 130] shows that a total of 89 vessels fished on all or some of the days of October. The size and type of these vessels does not appear nor do the days that they fished. It may take in too much territory to say, with appellee Salvatore Carnevale [A. 117], that "there were only two boats in a hundred miles of ocean," but he "never seen any boats all night just the two boats." Surely, however, in the waters adjacent to San Pedro there were not many boats fishing that night. Too many intangibles enter into the picture to make the proof offered at all satisfactory. Reference to

The World Almanac (1944 Edition)

shows the following lunar information during the days in question:

War Times Used.

Date	Sunset	Moonrise
Oct. 4, 1944	6:41	8:53 p.m.
5	6:40	9:37
6	6:39	10:24
7	6:37	11:14
8	6:36	12:06 a.m.
9	5:35	1:01
10	5:33	1:55
11	5:32	2:50
12	5:31	3:45

The moon was full on October 1, 1944, and in the last quarter phase on October 8, 1944. Sardine fishing is usually dependent upon seeing the phosphorescence of the school. As the moon gets above the horizon the boats go to port, as the GLORIA R was doing, because the moonlight prevents the lookout from seeing the schools. Fishing by listening for the "flippers" is usually unsatisfactory guesswork and too uncertain to be profitable. As can be seen from the moonrise and sunset table, for a large part of the nine-day period only part of the night was available for fishing. Other variables such as fog or rough weather are serious handicaps to fishing. That some or any of these nights were calm high overcast nights (the answer to the fisherman's prayer) is nowhere shown. The fortuitous element also must be considered [A. 230]. Any inferences based upon the proof here offered is too conjectural, speculative and uncertain to be of any value whatsoever.

VII.

Conclusion: The District Court's Decree Should Be Reversed.

(1) Appellees as crew members of a fishing vessel do not have a cause of action against appellant, their employer, arising out of a collision with a commonly owned vessel.

(2) The "charter party" or agreement under which appellees claimed they were operating precludes all claims for "loss of use" of the vessel.

(3) The GLORIA R was not in sole fault for the collision.

(4) Damages were not proved and were assessed by the District Court on an entirely erroneous basis.

The District Court should therefore be reversed.

Respectfully submitted,

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APPENDIX.

[Title of Court and Cause.]

Filed Nov. 6. 1947.

In Admiralty No. 4630 B.H.

Respondent's Memorandum on Damages.

After conferring with counsel for libelant and libelant subsequent to trial and opinion by the Court, no definite figures could be arrived at although some progress was made with the amounts (available in Respondent's Exhibit B) to be deducted from the gross catch as expenses of operation.

It appears that the Court has figured the estimated catch of the Bessemer during her layup as follows:

1. The total catch of the Bessemer for the balance of October, 1944, plus the catch for November, 1944 is to be divided by 45 days to get the average daily catch.
2. The average daily catch is to be multiplied by the number of days lost.
3. The expenses of operation are to be estimated, based on expenses of the balance of October and November, 1944, and deducted.
4. Social Security, Old Age Benefit and Withholding Taxes are to be deducted from the wages of the fishermen.

Libelant is to recover the net's share, 12 fishermen's shares, and the Master's 1½ share.

1. The Court computed the gross estimated catch as follows:

Catch during balance of October, 1944	896,850 lbs.
Catch during November, 1944	1,047,450 lbs.
Total catch during period	1,944,300 lbs.
Divide by 45 days to get daily average	43,206 lbs.
Reduced to tons	21.6 tons.
Value at $22.00 per ton	$475.20

It is here to be observed that the catch of the BESSEMER during the balance of October, figured in calendar days, would be made in October over a period of 18 days from deliveries from the 14th of October to the 31st of October, inclusive. If these days are added to the 30 calendar days of November, the divisor for computing the average daily catch would be 48.

In this event the daily average catch would be 1,-944,300 lbs. divided by 48 or 40,506 lbs. or 20.25 tons. The gross value of the average daily catch is $445.50.

2. It was suggested that the number of days lost was 10. Libelant asked in his libel for the loss during eight fishing days, and respondent requested that his recovery be so limited. The Court, however, preferred to include the intervening Sunday because the daily average was figured in calendar days. With the intervening Sunday included the period is only nine days.

Sailing Date	Delivery Date	Amount Delivered
1. October 4	October 5	lost day
2. October 5	October 6	lost day
3. October 6	October 7	lost day
4. October 7	No fishing because no delivery on Sunday.	
5. October 8	October 9	lost day
6. October 9	October 10	lost day
7. October 10	October 11	lost day
8. October 11	October 12	lost day
9. October 12	October 13	lost day
10. October 13	October 14	delivered 60,250 lbs.

The BESSEMER's lost time began with the night of October 4, 1944, which catch would have been delivered on October 5. 1944, and terminated with the delivery date of October 13, 1944. The BESSEMER sailed on the night of October 13, and delivered 60,250 lbs. of fish on October 14th. [See record of the Fish and Game Commission, Libelant's Exhibit 2.]

In accordance with the Court's direction that the intervening Sunday be included, we count nine lost days; the gross value of the average daily catch during the layup should therefore be multiplied by 9.

3. Expenses of fuel, oil, ice, dockage and other expenses of boat operation for the months of October and

November, 1944; as taken from Respondent's Exhibit B, and as conceded by Libelant are as follows:

	$ 94.27
	$ 69.42
	$ 46.51
	$ 14.22
	$ 68.59
	$ 24.07
	$ 3.74
	$ 85.73
Total expenses of boat operation during balance of October and November, 1944	$406.55

Computation of Value of Shares.

In the interest of assisting the Court to compute damages, we are listing below the various steps of the deductions to be made from the gross catch. In the left column, the amounts are figured on a 45 day basis; and in the right hand column, 48 day basis is used because the period October 14 to November 30, inclusive, is 48 days.

	45 day basis	48 day basis
Value of average daily catch	$ 475.20	$ 445.50
Multiply by 9 to get estimated catch during 9 day period	4,276.80	4,009.50
Fuel, oil, etc. expenses of operation of boat (Oct. and Nov.)	406.55	406.55
Average daily expenses	9.03	8.47
Multiply by 9 to get estimated expense during 9 day period	81.27	76.23
Deduct boat expenses from gross catch	4,195.53	3,933.27
Divide by 18.75 to get value of 1 share	223.76	209.88
Value of boat's share (2¾)	615.34	577.17
Value of net's share (2½)	559.40	524.70
Value of Master's extra one-half share	111.88	104.94
Total value of provisions during October and November	550.00	550.00

(These items appear on Respondent's Exhibit B as $276.26 plus $315.21 but the parties have agreed that some of the items are not properly included and have agreed to the figure of $550.00. Provisions are to be deducted only from crew's shares and not from the net's or the boat's or the Master's extra one-half share.)

	45 day basis	48 day basis
Total value 13 crew's shares before deducting provisions	$2,908.88	$2,728.44
Total value 13 crew's shares after deducting provisions ($550)	2,358.88	2,178.44
Value before taxes—one crewman's		
(Divide by 13) 9 day share	181.45	167.57
per day	20.16	18.62
Master's (1 crewman's share plus ½ boat share) 9 day share	293.33	272.51
per day	32.59	30.28
TAX DEDUCTION COMPUTATION.		
Value one crewman's share	181.45	167.57
Social Security and O.A.B. deduction (1% plus 1%)	3.63	3.23
	177.82	164.34
Withholding tax (9 x $3.75 per day)	33.75	
(9 x $3.40 per day)		30.60
Net crewman's share after taxes	$ 144.07	$ 133.74
Master's share (1½ shares)	$ 293.33	$ 272.51
Social Sec. and O.A.B. (1% plus 1%)	5.87	5.45
	$ 287.46	$ 267.06
Withholding Tax (9 x $6.04 per day)	54.36	
(9 x $5.60 per day)		50.40
Value Master's share	$ 233.10	$ 216.66

The Court has found that the libelant is entitled to recover the following items:

Net's share (2½)
12 Crewmen's shares
Master's (1½) share.

These amounts after deductions of expenses and taxes are:

	45 day basis	48 day basis
Net's share (2½ shares)	$ 559.40	$ 524.70
12 Crewmen's shares (12 times $144.07)	1,728.84	
(12 times $133.74)		1,604.88
Master's share (1½ shares)	233.10	216.66
Total recovery	$2,521.34	$2,346.24

Respectfully submitted,

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(McCutchen, Thomas, Matthew, Griffiths & Greene)

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